85-82

Office-Supreme Court, U.S.
FILED
JUL 15 1985
ALEXANDER L. STEVAS
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, *et al.*,
Petitioners,

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BERNARD N. KATZ
Lewis Tower Building
15th & Locust Streets
Philadelphia, PA 19102

RICHARD B. SIGMOND
260 South Broad Street
Philadelphia, PA 19102

LAURENCE J. COHEN
1125 - 15th Street, N.W.
Washington, D.C. 20005

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. May an antitrust claim against unilateral union action that does not allege any participation by non-labor entities be sustained, notwithstanding the "statutory exemption" to the antitrust laws which protects "unions acting in their self-interest and not in combination with non-labor groups," *H. A. Artists & Associates v. Actors' Equity Assn.*, 451 U.S. 704, 714?

2. After a district court has granted the defendants' motion for summary judgment on an antitrust claim alleging a conspiracy between labor unions and non-labor entities, may a court of appeals reinstate that claim without finding that the "circumstantial evidence" presented on the motion is more consistent with an inference of such a conspiracy than with an inference of independent action?

3. May the charging party in a proceeding before the National Labor Relations Board relitigate in a civil action an issue which has been decided by the Board?

PARTIES IN THE COURT BELOW

Altemose Construction Company; The Chamber of Commerce of the United States of America; Building & Construction Trades Council of Philadelphia and Vicinity; Asbestos Workers Local Union No. 14; Boilermakers Union Local No. 13; Bricklayers Union Local No. 1—Phila.; Bricklayers Union Local No. 12—Chester; Bricklayers Union Local No. 54—Norristown; Bricklayers Union Local No. 64—Residential; Building Service Employees Union Local No. 69; Carpenters Metropolitan District Council; Cement Masons Union Local No. 592; Custom Furniture & Drapery Workers Dry Wall Finishers Local Union No. 1955; Electricians Union Local No. 98; Electricians Local Union No. 126 (Linemen); Electricians Union Local No. 380—Norristown; Electricians Union Local No. 610; Electricians Union Local No. 654—Chester; Elevator Constructors Union Local No. 5; Glass Workers Union Local No. 1166; Glaziers Union Local No. 252; Granite Cutters Int. Union of America; Iron Workers District Council; Iron Workers Union Local No. 401; Laborers District Council; Lathers Union Local No. 53; Lathers Union Local No. 492—Residential; Lead Burners Local Union No. 532; Linoleum Layers and Floor Coverers, Union Local No. 1823; Millwrights and Machinery erectors, Union Local No. 1906; Operating Engineers Union Local No. 542; Painters District Council No. 21; Painters Union Local No. 641—Norristown; Painters Union Local No. 921—Chester; Paperhangers Union Local No. 587; Pipe Trades Council No. 31 of Philadelphia: Plasterers Union Local No. 8; Plasterers Union Local No. 574—Chester; Plasterer Tenders Union Local No. 376; Plumbers Union Local No. 690; Plumbers and Steamfitters, Union Local No. 428—Norristown; Pointers, Cleaners & Caulkers Union Local No. 35; Reinforced Rodsetters Union Local No. 405; Riggers & Machinery Movers Union Local No. 161; Roofers Union Local No. 30 (Composition); Roofers Union Local No. 113

(Slate-Tile); Sheet Metal Workers Union Local No. 19; Sheet Metal Workers Union Local No. 153—(Kitchen Equipment); Sign Makers & Hangers Union Local No. 194; Sign & Pictorial Painters Union Local No. 1159; Sprinkler Fitter Union Local No. 692; Stationary Engineers Union Local No. 835; Steamfitters Union Local No. 420; Stone Masons' Marble & Terrazzo Workers, Local Union No. 3; Terrazzo Workers Helpers Local Union No. 42; Tile and Marble Setters Hlprs., Local Union No. 32; Tile Layers Local Union No. 6; Wharf & Dock Builders Union Local No. 454.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES BELOW	ii
OPINIONS BELOW	1
JURISDICTION	2
STATUTES AND RULE INVOLVED	2
STATEMENT OF THE CASE	2
A. The Factual Background	2
B. The Two Counts of the Complaint, and Their Disposition by the Courts Below	7
REASONS FOR GRANTING THE WRIT	11
CONCLUSION	28

TABLE OF AUTHORITIES

CASES: Page

Allen Bradley Co. v. Union, 325 U.S. 797 ..... 13, 15
Building & Construction Trades Council, 222 NLRB 1276 (1976), *aff'd mem.*, 93 LRRM 3085 (C.A. 3) 25, 27
Connell Co. v. Plumbers & Steamfitters, 421 U.S. 616 ..... 10, 14, 15, 16, 17, 25
Consolidated Express, Inc. v. New York Shipping Ass'n, 602 F.2d 494 (C.A. 3), *vacated and remanded*, 448 U.S. 902 26
Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 23
Drivers' Union v. Lake Valley Co., 311 U.S. 91 25
Duplex Printing Press Co. v. Deering, 254 U.S. 443 12
First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 18
H.A. Artists & Associates v. Actors' Equity Assn., 451 U.S. 704 ..... 12, 13, 14
In re Japanese Electronic Products, 723 F.2d 238 (C.A. 3), *cert. granted sub nom., Matsushita Electric Industrial Co. Ltd. v. Zenith Radio*, No. 83-2004, 53 L.W. 3702 (Apr. 1, 1985) 7, 19, 20
International Wire v. Local 38, Int. Bro. of Elec. Wkrs., 475 F.2d 1078 (C.A. 6), *cert. denied*, 414 U.S. 867 25
Labor Board v. Insurance Agents, 361 U.S. 477 24
Landmark Development Corp. v. Chambers Corp., 752 F.2d 369 (C.A. 9) 23
Machinists v. Nix, 512 F.2d 125 (C.A. 5) 26
Mine Workers v. Pennington 16, 17
Monsanto Co. v. Spray-Rite Service Corp., —— U.S. ——, 104 S.Ct. 1464 (March 20, 1984) 22, 23, 24
Painters District Council 38 v. Edgewood Contracting Co., 416 F.2d 1091 (C.A. 5) 26
Paramount Transp. Sys. v. Chauffeurs, Teamsters & Helpers Local 150, 529 F.2d 1284 (C.A. 9), *cert. denied*, 448 U.S. 902 26
Royal Drug Co. v. Group Life & Health Insurance Co., 737 F.2d 1433 (C.A. 5), *cert. denied*, 53 L.W. 3507 (Jan. 14, 1985) 23

TABLE OF AUTHORITIES—Continued

Page

United States v. Hutcheson, 312 U.S. 219 ..... 11, 12, 14
United States v. Utah Construction Co., 384 U.S. 91 ..... 26, 27
U.S. v. Colgate, 250 U.S. 300 23
U.S. v. General Motors, 323 U.S. 373 25

STATUTES AND RULES:

Clayton Antitrust Act:

§ 6 2
§ 20 2

Judicial Code:

28 U.S.C. § 1254 2
28 U.S.C. § 1331 2
28 U.S.C. § 1337 2

Labor-Management Relations Act of 1947:

§ 301 21
§ 303 25

National Labor Relations Act, as amended:

§ 8(b) (4) 25, 26
§ 8(b) (7) (C) 25
§ 10 10

Norris-La Guardia Act:

§ 4 2
§ 6 2
§ 13 2

Sherman Antitrust Act:

§ 1 2
§ 2 2

Federal Rules of Civil Procedure:

Rule 56 2

NLRB Rules and Regulations:

29 CFR § 102.8 27
29 CFR § 102.38 27
29 CFR § 102.46 27

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No.

BUILDING & CONSTRUCTION TRADES COUNCIL OF PHILADELPHIA AND VICINITY, *et al.*,
Petitioners.

v.

ALTEMOSE CONSTRUCTION COMPANY AND CHAMBER OF COMMERCE OF THE UNITED STATES,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Building & Construction Trades Council of Philadelphia and Vicinity *et al.*, defendants-appellees in the courts below, hereby petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit to review that court's decision and judgment in *Altemose Const. v. Bldg. & Conts. Trades Council*, 751 F.2d 653 (C.A. 3 Nos. 83-1581 & 83-1582, 1985).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 751 F.2d 653 and is reproduced in the separately bound Appendix to this Petition for a Writ of Certiorari ("App.") at pp. 1a-19a. The opinion of the District Court is not officially reported, but is unofficially reported at 117 LRRM 3170; that opinion is reproduced at App. 20a-81a.

JURISDICTION

The decision of the court of appeals was rendered on January 8, 1985, and a timely petition for rehearing was denied on February 15, 1985. App. 82a-83a. On May 7, 1985, Justice Brennan entered an order extending the time for filing this petition to and including July 15, 1985. This Court has jurisdiction under 28 U.S.C. § 1254 (1). The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337.

STATUTES AND RULE INVOLVED

This case involves §§ 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2; §§ 6 and 20 of the Clayton Antitrust Act, 15 U.S.C. §§ 17 and 29, and §§ 4, 5 and 13 of the Norris-LaGuardia Act, 29 U.S.C. §§ 104, 105 and 113. The case also involves Rule 56 of the Federal Rules of Civil Procedure. These various provisions are reproduced in pertinent part at App. 84a-89a.

STATEMENT OF THE CASE

A. The Factual Background.

The nature of the case, the parties, and the evidence on the basis of which the district court entered summary judgment for the defendants are set forth in that court's comprehensive opinion. The district court "accepted" the plaintiffs' statement of material facts submitted on that motion "as a basis for [its] decision," App. 21a, n.3, and the court of appeals did not disagree with, much less overrule, any of the district court's factual findings. We therefore adopt the district court's statement of the case for purposes of this petition.[1]

The district court began by identifying the parties:

> This is an action for both declaratory and injunctive relief under the Declaratory Judgment Act, and for damages pursuant to § 4 and 16 of the Clayton

[1] Some of the district court's footnotes are omitted, one has been renumbered, and a citation to the Appendix supplied.

> Act. The plaintiffs are Altemose Construction Co. ("Altemose"), a general contractor in the Philadelphia area; Associated Builders and Constructors, Inc. ("ABC"), an association of open shop contractors, and the Chamber of Commerce ("Chamber"), an association whose members purchase construction services. The defendants are the Building and Construction Trades Council of Philadelphia ("Council"), a labor association of local trade unions, and fifty-six labor organizations who are members of the Council. There are also other unnamed union contractors, suppliers and financial institutions implicated in a conspiracy to restrain trade and monopolize the construction market in a five county geographic area. [App. 21a-22a]

That court then described the salient facts about the Philadelphia area construction industry—including its labor relations system—in which the parties operated:

> In the construction industry owners and developers solicit bids from general contractors for particular building projects. The general contractor who receives the contract will ordinarily subcontract most of the specialty work to other subcontractors who perform the work at the job site. There is no established pattern as to the amount of work performed by the general contractor's own employees and that which is subcontracted. Some general contractors employ no construction employees other than supervisory personnel. A subcontractor is usually a separate business enterprise specializing in one phase of construction. Labor relations policy for each subcontractor is decided initially by that business enterprise. Union subcontractors in the greater Philadelphia area have agreed to be bound by the terms of multi-employer collective bargaining agreements with the various trade unions.
>
> The purpose of the Council is "[t]o establish and maintain legal and proper business relations and agreements between [itself] and other responsible parties, either individuals or associations, to the ex-

tent that the best interest of the building industry be served for both employers and employees." By-Laws Art. II, § 3. Its geographic jurisdiction is the five counties of Delaware Valley; Philadelphia, Chester, Bucks, Delaware and Montgomery, and "completely covers the building and construction industry, either in erection, repair, alteration or demolition." Exb. 22 at 1. More importantly for its member unions, the Council is prohibited from entering into any agreement with a contractor or employers' association which requires union members to work with non-union men. Id. at 22.

Most building trade union By-Laws have a prohibition against their members working with non-union employees or non-union firms. These clauses generally require members to report non-union jobs to the union and refuse to handle non-union goods. The General Building Contractors Association ("GBCA") represents active general contractor and subcontractor members who assign to it their rights to bargain collectively with certain defendant unions. Some of the defendant trade unions have established standard collective bargaining agreements with GBCA. The collective bargaining agreements give the union members the right not to work with non-union laborers. The GBCA member contractors hire only union employees under the terms of these agreements and never contract with subcontractors who are not on the Council's fair contractor list. The administration expense of the collective bargaining agreements is financed through an Industry Advancement Fund to which employers make contributions based on hours worked by their union employees. Contributions are required from all employers of covered workers even though such employers are not GBCA members.

The Council seeks to establish and maintain adequate wages and working conditions by members of its constituent unions by means of a Building Trades Agreement which the Council attempts to have gen-

> eral contractors sign.[2] The Council has entered into over four hundred (400) of these agreements with general contractors. They require the general contractor to do business only with subcontractors who enter into collective bargaining agreements with the appropriate craft union members of the Council. The only subcontractors with whom the general contractor may do business under such an agreement are Council approved union (so-called "fair") subcontractors. These fair subcontractors all have collective bargaining agreements with the appropriate trade or craft unions. The "fair" list is circulated by the Council throughout the industry. Since 1966, over 90% of the non-residential construction work has been performed by union contractors. [App. 22a-24a]

Finally, the district court described the genesis of the labor dispute between the plaintiff Altemose and the defendant unions and the course that dispute followed:

> In order to obtain these subcontracting agreements from general contractors, the defendants have picketed jobsites where non-union men are working; there have been threats of violence as well as actual violence at various construction sites in the course of this picketing. The unions have also employed economic pressure on developers, owners and financial institutions to force general contractors to employ union labor exclusively. Some contractors have acceded to union demands and hire only union labor or signed an agreement not to subcontract any work to any subcontractor who has not contracted with the appropriate craft union. Although these tactics have been employed against Altemose since 1971, Altemose has refused to sign such an agreement.

---

[2] See Appendix for Text of Forms 1, 2 and 3. [App. 74a-81a] The forms include a clause binding the firm and any other operation in which the signatory firm has a substantial interest, whether or not under separate corporate or company name, e.g., App. I "Scope of Obligation."

In April 1971, Altemose obtained a general contract to build Valley Forge Plaza in Montgomery County, Pennsylvania. The project consisted of an office building, a hotel, movie theaters and various stores and shops. Altemose representatives had several meetings with representatives of the Council concerning the exclusive use of union labor on the project. The Altemose policy was that specialty work for the project would be given to the lowest bidding subcontractor whether or not it employed union labor. It was anticipated that this would result in unionized subcontractors for more than half the project work. The Council and its member unions insisted that unless Altemose signed a subcontractor's trade agreement there would be picketing at the jobsite.

On occasion, between August, 1971 and May, 1972, enter into a subcontractor's trade agreement with several Altemose construction projects were picketed by union members to protest Altemose's refusal to the Council. On June 5, 1972 approximately 1,000 persons, including some principals of the Council, came to the Valley Forge Plaza construction site; what was described by a Pennsylvania trial judge as a "virtual military assault" resulted in the "systematic decimation of the project. Damage was estimated at $300,000 . . . ."

Thereafter, negotiations took place at which time the Council repeated its demand that the Valley Forge project be built solely with union labor. Altemose refused. Picketing occurred at another Altemose job-site in November, 1973 and several projects were continuously picketed from January, 1975 through April, 1975 to protest the Altemose refusal to sign a union subcontractor agreement with the Council. After unfair labor practice charges were filed, the NLRB issued an injunction on April 22, 1975, but picketing resumed on April 28, 1975. Its stated purpose was to require Altemose to observe area wages and standards (rather than to compel it to sign a union subcontractor agreement). After further litigation before the NLRB, the picketing

ceased at those sites and the Board issued its decision.

During the period of labor dispute, material suppliers and subcontractors informed Altemose that they would no longer be involved with its construction projects because of the continuing labor problems. The pressure against non-union subcontractors consisted of threats and intimidation to force them to cease doing business with Altemose and other general contractors. Investors in the projects were urged by the unions to withdraw their financial support. The union membership and general public were urged to withdraw their funds from First Pennsylvania Bank, a major financier of the Valley Forge Project. Because of the labor unrest, Altemose also found it more difficult to obtain performance bonds for its projects and did not receive some jobs even though it had been the low bidder. Some business associations cancelled reservations for use of the Sheraton Hotel in the Valley Forge complex because of their union sympathies.

The union actions against other general contractors who are members of the ABC were similar in kind to those experienced by Altemose. Union sponsored picketing pressured general contractors to utilize union subcontractors; the union pressure directed at these general contractors was to replace non-union with union subcontractors on the Council's "fair" list. Union pressure was also directed toward suppliers of material and capital (i.e., investors and financial institutions) to convince them to withdraw support for the projects. It cannot be denied that the Council's actions in a sense protected union employers as well as its union members. [App. 24a-26a]

B. The Two Counts of the Complaint, and Their Disposition By The Courts Below.

The complaint in the instant case pleads two counts; both are fairly summarized by the court of appeals:

> Count I alleges that the local union defendants and the council conspired with non-labor entities to exclude non-union general and subcontractors from the Philadelphia area construction market.
>
> * * * *
>
> The second count of the complaint alleges that the local unions and the council conspired to force non-union employers out of the Philadelphia construction market. *This count does not allege participation by non-union entities in a conspiracy having secondary effects.* [App. 3a, 10a-11a; emphasis added.]

The district court (Shapiro, J.) granted summary judgment dismissing count I on the ground that the plaintiffs failed to present any evidence of a combination or conspiracy with non-labor entities in opposing the defendants' motion for summary judgment. App. 66a-73a.

That court also granted summary judgment dismissing count II. In so doing, the district court held, *inter alia*, that because count II does not allege a union-employer conspiracy the "conduct alleged in count II is without antitrust significance." App. 42a; *see also id.* 42a-53a.

Plaintiffs Altemose and the Chamber of Commerce (but not the Associated Builders & Contractors) appealed. The court of appeals reversed the grants of summary judgment on both count I and count II and reinstated the action.

With respect to count I, the Third Circuit, following the standard governing the sufficiency of evidence of conspiracy which that court had adopted in *In re Japanese Electronic Products*, 723 F.2d 238, 303-305, *cert. granted, sub nom. Matsushita Electric Industrial Co. Ltd. v. Zenith Radio Corp.*, No. 83-2004, 53 L.W. 3702 (Apr. 1, 1985), ruled that the evidence in the record here is sufficient to permit an inference of a "concert of action between labor and non-labor entities":

> The record contains circumstantial evidence that the unions maintained a fair contractor list; that the

> Council exerted primary and secondary pressure which had the inevitable effect of benefiting contractors on the list; that firms not on the list were almost totally excluded from the market; that the General Building Contractors Association policed its members to prevent use of non-union contractors, although the contractors' economic interest would suggest, *prima facie*, use of the lowest responsible bidders without regard to unionization; and that an officer of the Council offered to obtain bids from firms on the fair contractors list if Al'emose would sign a Building Trades Agreement. A finder of fact evaluating this evidence could reasonably infer that the Council and the General Building Contractors Association acted in concert to exclude non-union firms from the market. The evidence of such concert of action is not overwhelming, but it is not our task on a motion for summary judgment to weigh it, so long as it is sufficient to support a reasonable inference. [App. 10a]

The court of appeals, while noting that count II alleges only "concerted coercive activities in which the Council and its member locals may have been found to have been engaged," App. 11a, concluded on two grounds that the count nonetheless states an actionable antitrust claim. That court said first:

> Count II alleges, and the summary judgment record would permit a finding, that the open shop contractors have been injured in their business and property by the exclusion of subcontractors from the construction market in the Philadelphia area, and by the inability of general contractors to obtain bids from union subcontractors. The record is clear that the Council has obtained Building Trades Agreements from hundreds of signatories. It is true that in *Connell* the Court made reference to the fact that the plaintiff had signed a contract, implying that this satisfied the *Bradley-Pennington* requirement of participation in the combination of a non-labor party. 421 U.S. at 620, 622, 95 S.Ct. at 1834, 1835. The

> opinion cannot be read as suggesting, however, that contractors who do not sign a contract but are affected by agreements between a union and non-labor parties are unprotected by the antitrust laws. Clearly the Council did not act unilaterally when it obtained hundreds of agreements from contractors the intent and effect of which was to exclude non-union contractors from the market. * * * [App. 12a-13a.]

The court of appeals added that while the district court had held that under *Connell Co. v. Plumbers & Steamfitters*, 421 U.S. 616, the unions' actions against Altemose are outside the antitrust laws because the unions "had an organizational purpose at all times," on the evidence in the record "the existence of a purpose to organize employees of Altemose and other ABC contractors is a disputed issue of material fact which could not be resolved in the defendants' favor on a Rule 56 motion." App. 17a. The court of appeals rejected the district court's reliance on a determination by the National Labor Relations Board, in a case brought by Altemose as the charging party, that the unions' activities did have an organizational purpose, stating:

> We have held that a Board decision may be given preclusive effect in a subsequent antitrust case. * * * In that case, however, the party against which collateral estoppel was asserted was a respondent, which controlled its side of the litigation before the Board. Altemose, as the charging party, had no control over the factual or legal issues tried before the Board because the General Counsel controlled the litigation. 29 U.S.C. § 160 (1982). Moreover, ABC and the Chamber of Commerce were not involved in the Board proceeding even as charging parties. Thus it is clear that no plaintiff had a full and fair opportunity to litigate the issue of organizational purpose before the Board, and all are free to attempt to do so in this proceeding. [App. 18a.]

REASONS FOR GRANTING THE WRIT

Introduction

On the important and historically controversial subject of the role of the antitrust laws in regulating labor union activities, one principle has been firmly established for over forty years since *United States v. Hutcheson*, 312 U.S. 219 (1941): labor unions may not be held liable under the antitrust laws when the unions act in their own self-interest and not in combination with a non-labor group. (See pp. 12-18, *infra.*) The decision of the court of appeals undermines that principle by two rulings each of which enables a plaintiff to prevail on an antitrust claim *without* establishing the existence of such a combination.

That court reinstated an antitrust claim (count II) from which plaintiffs deliberately omitted any allegation of a union-nonlabor group conspiracy. And, in reinstating count I of the complaint here the court of appeals ruled that an antitrust plaintiff raises a triable issue of fact on a motion for summary judgment if there is "circumstantial evidence" from which a union-nonlabor group conspiracy "could be inferred," but without even considering whether that evidence is equally susceptible of an inference of independent, non-conspiratorial conduct.

The first of these rulings simply reverses forty years of decisions in this Court. (See pp. 12-18, *infra.*) And while the latter ruling is not as obviously inconsistent with the Court's labor/antitrust precedents, its inevitable consequence is likewise to undermine the requirement that the plaintiff establish a union-nonlabor conspiracy. The standard for determining whether evidence is sufficient to permit a conspiracy claim to go forward is a familiar and important issue under the antitrust laws that is before this Court also in a case in which review has already been granted. (See pp. 18-24, *infra.*)

Additionally, the court below sharply circumscribed the collateral estoppel effect of decisions of the National

Labor Relations Board. This ruling, which has widespread significance, is in square conflict with decisions of two courts of appeals and is contrary to the governing principle set forth by this Court. (See pp. 24-27, *infra.*)

I.

This Court's jurisprudence on the labor exemptions to the anti-trust laws rests on a fundamental distinction between anti-trust complaints where "labor unions [are] acting in their self-interest and not in combination with non-labor groups" and complaints where "a union [has combined] with a 'non-labor group'." *H.A. Artists & Associates v. Actors' Equity Assn.*, 451 U.S. 704, 714, 715. The decision below eradicates that distinction wherever the union defendants have entered into collective agreements with one group of employers and are seeking on their own and without "participation by non-union entities in a conspiracy having secondary effects," App. 10a, to secure the same type of agreement from other employers. In essence the court of appeals has revived the judicial doctrine repudiated by Congress first in the Clayton Act and then, after *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, again in the Norris-La Guardia Act and ultimately, in light of those congressional responses, by this Court in *United States v. Hutcheson*, 312 U.S. 219.

H.A. Artists is this Court's most recent reaffirmation of the governing law. That decision begins by noting the "inherent tension" that has made it so difficult to harmonize anti-trust policy and national labor policy and by recapitulating the initial wrong steps by the judiciary that led to congressional correction and the Court's consequent reformulation of the law to accord with Congress' will in *Hutcheson*:

> Labor unions are lawful combinations that serve the collective interests of workers, but they also possess the power to control the character of com-

petition in an industry. Accordingly, there is an inherent tension between national anti-trust policy, which seeks to maximize competition, and national labor policy, which encourages cooperation among workers to improve the conditions of employment. In the years immediately following passage of the Sherman Act, courts enjoined strikes as unlawful restraints of trade when a union's conduct or objectives were deemed "socially or economically harmful." *Duplex Printing Press Co.* v. *Deering*, 254 U.S. 443, 485 (Brandeis, J., dissenting). In response to these practices, Congress acted, first in the Clayton Act, 38 Stat. 731, and later in the Norris-LaGuardia Act, 47 Stat. 70, to immunize labor unions and labor disputes from challenge under the Sherman Act.

* * *

In *United States* v. *Hutcheson*, 312 U.S. 219, the Court held that labor unions acting in their self-interest and not in combination with nonlabor groups enjoy a statutory exemption from Sherman Act liability. After describing the congressional responses to judicial interference in union activity, *id.*, at 229-230, the Court declared that

> [s]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means." *Id.*, at 232 (footnote omitted). * * *

[451 U.S. at 713-715; footnotes omitted.]

The *H.A. Artists* Court then summarized the limitation on the foregoing exemption recognized in *Hutcheson* itself and elaborated in *Allen Bradley Co.* v. *Union*, 325 U.S. 797:

> The statutory exemption does not apply when a union combines with a "non-labor group." *Hutche-*

> *son*, *supra*, at 232. Accordingly, antitrust immunity is forfeited when a union combines with one or more employers in an effort to restrain trade. In *Allen Bradley Co.* v. *Electrical Workers*, 325 U.S. 797, for example, the Court held that a union had violated the Sherman Act when it combined with manufacturers and contractors to erect a sheltered local business market in order "to bar all other business men from [the market], and to charge the public prices above a competitive level." *Id.*, at 809. The Court indicated that the union efforts would, standing alone, be exempt from antitrust liability, *ibid.*, but because the union had not acted unilaterally, the exemption was denied. Congress "intended to outlaw business monopolies. A business monopoly is no less such because a union participates, and such participation is a violation of the Act." *Id.*, at 811. [451 U.S. at 715-716; footnotes omitted.]

Finally, *H.A. Artists* adds "Even where there are union agreements with nonlabor groups that may have the effect of sheltering the nonlabor groups from competition in product markets, the Court has recognized a "nonstatutory" exemption to shield such agreements if they are intimately related to the union's vital concerns of wages, hours, and working conditions.", *id.* at 716, n.19, and quotes extensively from *Connell Co.* v. *Plumbers & Steamfitters*, 421 U.S. 616, 622.

In sum, the starting point of, and the single immutable principle in, all of this Court's decisions from *Hutcheson* to *H.A. Artists* is "that labor unions acting in their self-interest and not in combination with nonlabor groups enjoy a statutory exemption from Sherman Act liability," 451 U.S. at 714. Nonetheless, in the instant case the court of appeals denied this statutory exemption to actions taken by the defendant unions on their own and without "participation by non-union entities." App. 10a. According to the court below, where, as here, a plaintiff non-union employer alleges that unilateral union actions directed against the plaintiff take place against a back-

ground of union-employer agreements "the intent and effect of which was to exclude non-union contractors from the market" the statutory exemption no longer protects the actions of the union acting alone. App. 12a-13a.

As a practical matter, the approach of the court of appeals leaves nothing of the statutory exemption. All viable unions are party to collective agreements. If, as here, the allegation that these agreements have an adverse anticompetitive effect on the plaintiff is sufficient to deny the defendant union the protection of the exemption insofar as the union acts alone, the exemption has no meaning. At that point, such union action, as well as union-nonlabor group agreements, would, under that court's view, be judged in the first instance by the far less protective standard of the "limited nonstatutory exemption" designed for judging "union-employer agreements," *Connell*, 421 U.S. at 622.

This reading of the antitrust laws stands this Court's cases on their head. The point of *Allen-Bradley* and its progeny is that the antitrust laws are aimed at combinations of businessmen and at the protection of product and service markets from such combinations, that the antitrust laws are not aimed at labor unions as such and that the antitrust laws therefore reach only unions that "aid and abet businessmen who are violating the Act." 325 U.S. at 807. In *Allen-Bradley*, the Court expressly recognized:

> Our holding means that the same labor union activities may or may not be in violation of the Sherman Act, dependent upon whether the union acts alone or in combination with business groups. That, it is argued, brings about a wholly undesirable result—one which leaves labor unions free to engage in conduct which restrains trade. But the desirability of such an exemption of labor unions is a question for the determination of Congress * * *. Congress evidently concluded * * * that the chief objec-

> tive of Anti-trust legislation, preservation of business competition, could be accomplished by applying the legislation primarily only to those business groups which are directly interested in destroying competition. * * * A business monopoly is [however] no less such because a union participates, and such participation is a violation of the Act. [325 U.S. at 810-811.]

And in *Mine Workers v. Pennington*, 381 U.S. 657, the next major step in the evolution of the Court's treatment of union-nonlabor group agreements, combinations and conspiracies, the Court emphasized:

> We have said that a union may make wage agreements with a multi-employer bargaining unit and may in pursuance of its own union interests seek to obtain the same terms from other employers. No case under the antitrust laws could be made out on evidence limited to such behavior. But we think a union forfeits its exemption from the antitrust laws when it is clearly shown that it has agreed with one set of employers to impose a certain wage scale on other bargaining units. One group of employers may not conspire to eliminate competitors from the industry and the union is liable with the employers if it becomes a party to the conspiracy. This is true even though the union's part in the scheme is an undertaking to secure the same wages, hours or other conditions of employment from the remaining employers in the industry. [381 U.S. at 665-666; footnote omitted.]

Plainly this reasoning leaves no room for the court of appeals' supposition that the fact that the defendant union is a party to collective agreements is a basis for denying the union the statutory exemption for its unilateral actions. Nor does *Connell*, the one decision in this Court relied on by the court below, support its position. That case, as the court of appeals recognized, in both form and substance dealt with the legality of a union-employer agreement not with unilateral union action.

(*See* App. 12a: "It is true that in *Connell* the Court made reference to the fact that the plaintiff had signed a contract, implying that this satisfied the *Bradley-Pennington* requirement of participation in the combination of a non-labor party. 421 U.S. at 620, 622.") And the *Connell* Court made it plain at the very outset that this fact was its basis for treating the controversy as one raising a non-statutory exemption issue:

> The basic sources of organized labor's exemption from federal antitrust laws are §§ 6 and 20 of the Clayton Act, 38 Stat. 731 and 738, 15 U.S.C. § 17 and 29 U.S.C. § 52, and the Norris-La Guardia Act, 47 Stat. 70, 71, and 73, 29 U.S.C. §§ 104, 105, and 113. These statutes declare that labor unions are not combinations or conspiracies in restraint of trade, and exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws. See *United States* v. *Hutcheson*, 312 U.S. 219 (1941). They do not exempt concerted action or agreements between unions and nonlabor parties. *Mine Workers* v. *Pennington*, 381 U.S. 657, 662 (1965). The Court has recognized, however, that a proper accommodation between the congressional policy favoring collective bargaining under the NLRA and the congressional policy favoring free competition in business markets requires that some union-employer agreements be accorded a limited nonstatutory exemption from antitrust sanctions. *Meat Cutters* v. *Jewel Tea Co.*, 381 U.S. 676 (1965). [421 U.S. at 621-622.]

The proposition that *Connell* can be read as an instruction to the lower courts to judge unilateral union action (such as that here at issue in count II) as well as union-employer agreements (such as the one in that case or the combination alleged in count I here) according to the limited non-statutory exemption rather than the statutory exemption is flatly contrary to the *Connell* opinion. For the Court there reaffirmed that while the Clayton and Norris-La Guardia Acts do "not exempt concerted action or agreements between unions and nonlabor parties,"

Congress, in those enactments, did "exempt specific union activities, including secondary picketing and boycotts, from the operation of the antitrust laws."

The court of appeals evidently finds fault with Congress' judgment on this matter. Sound public policy, as that court would make policy, is that "contractors who do not sign a contract [with a union] but are affected by agreements between a union and non-labor parties," like contractors who do sign an agreement, should be "[]protected by the antitrust laws." App. 13a. But Congress' policy, as this Court has recognized, is otherwise. Unilateral union action not undertaken as part of a combination or conspiracy with businessmen no matter what its purpose and effect is by reason of the Clayton and Norris-LaGuardia Act entirely outside the antitrust laws and is regulated by the labor laws and by compatible state law. Only certain union-nonlabor group agreements are subject to the antitrust laws. That is the line Congress drew and the line the courts are obligated to respect.

II.

A recurring and central issue in civil antitrust litigation is the nature and quantum of proof of conspiracy—absent direct evidence thereof—that the plaintiff must present in order to withstand a motion for summary judgment by the defendant. The Court squarely confronted this issue in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, holding that the plaintiff's showing in opposition to a defendant's motion for summary judgment was insufficient because

> the inference that Cities' failure to deal was the product of factors other than conspiracy [was] at least equal to the inference that it was due to the conspiracy, thus negating the probative force of the evidence showing such a failure * * *. [391 U.S. at 280.]

Here, however, the court of appeals reversed the district court's grant of summary judgment to the defendant un-

ions on the count which alleges a conspiracy between the unions and non-labor entities merely because such a conspiracy "could be inferred" from the actions of the alleged conspirators, App. 10a, without even considering whether there is an equal inference that each of those actions rests on an independent and non-conspiratorial base.

This Court has already granted certiorari to decide whether the Third Circuit is applying too loose a standard in determining whether a plaintiff has presented sufficient evidence to permit an inference of conspiracy so as to withstand a motion for summary judgment in an antitrust suit. *Matsushita Electric Industrial Co., Ltd., v. Zenith Radio Corp.*, No. 83-2004, *cert. granted* April 1, 1985, 53 L.W. 3702, to review *In re Japanese Electronic Products*, 723 F.2d 238 (C.A. 3).[3] That is the decision the court below followed in the present case in enunciating the standard for considering the sufficiency of the conspiracy evidence.[4] In both instances, Judge Gibbons, writing for the court of appeals, set aside a summary judgment that the district court had granted to the de-

---

[3] The first question presented by the petition for certiorari in *Matsushita* is:

> Whether, in an antitrust conspiracy case based upon "parallel" acts and other circumstantial evidence, summary judgment for the defendants may be reversed when the District Court has found that all of the evidence is entirely consistent with the independent economic self-interest of each defendant, and the Court of Appeals has neither rejected that finding nor even considered whether defendants' actions were more consistent with an inference of conspiracy than with an inference of independent action? [Pet. for Cert. No. 83-2004, p. i]

[4] This Court recently outlined the legal standard governing sufficiency of evidence of conspiracy. We noted that the court must examine all admissible evidence, direct and circumstantial, in order to determine whether a trier of fact could reasonably infer concert of action. *In re Japanese Electronic Products*, 723 F.2d 238, 303-05 (3d Cir. 1983). [App. 5a]

fendants after a comprehensive evaluation of the evidence submitted by the plaintiffs.[5]

It would, we submit, be appropriate to consider the instant case together with *Matsushita* because this case casts further light on the serious infirmities of the Third Circuit's approach. As we shall briefly show, each of the pieces of "circumstantial evidence" on the basis of which that court held that there is sufficient evidence to permit the inference of a conspiracy between the defendant unions and non-labor entities is at least equally—and in our view far more plausibly—susceptible to the opposite inference.

The first two points made by the court of appeals are closely related and properly discussed together. That court relied on evidence "that the unions maintained a fair contractor list [and] that the Council exerted primary and secondary pressure which had the inevitable effect of benefitting contractors on the list." App. 10a. But earlier in the opinion the court of appeals itself had acknowledged the weakness of the evidence as support for an inference of conspiracy:

> One result of the Council's pressure tactics was to favor contractors on its list of fair contractors. Another result, however, was to obtain the work for members of its local unions. Absent some additional evidence, the inference that the Council acted in concert with the contractors in pursuit of the first objective would be highly speculative. [App. 9a] [6]

---

[5] Here Judge Shapiro cited the opinion Judge Becker had written in the district court in *Matsushita*: "While the Supreme Court has cautioned that summary judgment should be used sparingly in antitrust cases, summary adjudication may be granted even in these complex cases. See *Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd.*, 513 F. Supp. 1100, 1140, n.53 (E.D. Pa. 1981), appeal docketed * * * (3rd Cir. Aug. 24, 1981)." App. 30a, footnote omitted.

[6] Even the foregoing characterization puts the evidence of the unions' actions in a light too favorable to the plaintiffs. Keeping a

Nor does the other "circumstantial evidence" relied on below render more probable an inference of conspiratorial rather than wholly innocent conduct. The court of appeals observed that the General Building Contractors Association policed its members to prevent use of non-union contractors, although "the contractors' economic interest would suggest, *prima facie*, use of the lowest responsible bidders without regard to unionization." App. 10a. This simply disregards the members obligation under the collective bargaining agreements to "hire only union employees and to refrain from subcontracting with subcontractors who are not on the Council's fair contractor list." App. 4a. Adherence to a legal obligation is an entirely reasonable and proper non-conspiratorial course of conduct, and the Association's insistence thereon is wholly consistent with its role as the contractors' joint bargaining representative. *Id.* And even if, contrary to general experience, parties can be expected to violate their contracts whenever it is in their economic self-interest to do so, the very existence of this legal obligation obviously alters their economic calculation.[7]

---

list of "fair contractors" is useful if not indispensable to further the unions' interest in knowing at all times whether there is an operative agreement with a particular contractor (so that the unions can police compliance with the agreement and fulfill their own obligations thereunder) or, alternatively, whether, because the contractor is not on the list, an effort should be made to obtain an agreement from him. This need is especially acute in the building and construction industry where each local union is likely to have contracts with a large number of contractors, and where the situs of those contractors' operations is constantly shifting. Moreover, unions exercise their economic weapons in order to achieve their own immediate objectives, such as more favorable working conditions, or to organize the unorganized. Only in the most extraordinary circumstances is the benefit to the struck employer's competitors a purpose, let alone the principal purpose, of the unions' action.

[7] Thus, to obtain a short-run benefit at lower wages, a contractor breaching that subcontracting clause would risk financial liability in a suit under § 301 of the Labor-Management Relations Act of 1947 ("LMRA"). Further, like any employer or other businessman who

Lastly, the evidence "that an officer of the Council offered to obtain bids from firms on the fair contractors list if Altemose would sign a Building Trades Agreement," App. 10a, is entirely consistent with the unions' interest in getting Altemose to do so, by assuring Altemose that the company could operate economically under the subcontracting clause.[8]

A further ground for review of the court of appeals' reinstatement of count I is that unless the courts scrupulously insist that evidence proffered to support an antitrust conspiracy be at least equally probative of such a conspiracy as of independent decision-making, the antitrust laws will place in jeopardy parties who engage in activities which those laws permit. This is the danger which was identified in *Monsanto Co. v. Spray-Rite Service Corp.*, —— U.S. ——, 104 S.Ct. 1464 (March 20, 1984), in prescribing "the standard of proof required to submit a case to the jury in distributor-termination ligigation." *Id.* at 1468. In *Monsanto* the Court was concerned with the evidentiary standard for deciding whether a manufacturer's termination of a distributor who had been cutting prices was the manufacturer's independent action or the consequence of a price-fixing agreement between the manufacturer and the price cutting distributor's competitors. The Court held:

> On a claim of concerted price-fixing, the antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was [a price fixing] agreement. If an inference of such an agreement may be drawn from highly ambiguous evidence,

---

breaches an agreement, he would undermine his long-term relationship with the other contracting party, here the union.

[8] Indeed, if the Council had refused to find union subcontractors for Altemose (although it was under no duty to do so), Altemose might have argued with equal plausibility that this supported an inference that the Council was trying to drive Altemose out of the market.

> there is a considerable danger that the doctrines enunciated in *Sylvania* and *Colgate* will be seriously eroded. [104 S.Ct. at 1470.] [9]

See also id. at 1471.[10]

The references to *Sylvania* and *Colgate* were, of course, to this Court's decisions which held, respectively, that concerted action between manufacturers and distributors creating *non-price* restrictions is not *per se* illegal but is subject to the rule of reason [11] and that a manufacturer may lawfully refuse to deal with a distributor who fails to adhere to the retail price established by the manufacturer.[12]

---

[9] While *Monsanto* arose on review of the sufficiency of the evidence to support a jury verdict for the plaintiff, there is no material distinction between the standard of proof in that procedural context and on a motion for summary judgment. Accordingly, the courts of appeals of two circuits have applied the *Monsanto* standard in reviewing, and affirming, grants of summary judgment to defendants because the respective plaintiffs had failed to make a sufficient showing to support their claims of conspiracy. *Royal Drug Co. v. Group Life & Health Insurance Co.*, 737 F.2d 1433, 1438 (C.A. 5), *cert. den.* 53 L.W. 3507 (January 14, 1985); *Landmark Development Corp. v. Chambers Corp.*, 752 F.2d 369, 372 (C.A. 9).

[10] There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective." *Edward J. Sweeney & Sons, supra*, at 111; accord *H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (CA 2 1981) cert. denied, 459 U.S. 880 (1982); cf. *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946) (Circumstances must reveal "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement").

[11] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36.

[12] *U.S. v. Colgate & Co.*, 250 U.S. 300.

As in *Monsanto*, the "flaw in the evidentiary standard" adopted by the court of appeals in this case is that it "disregards this danger," by allowing the plaintiff to proceed on what is as we have shown, at most "highly ambigious evidence" of conspiracy. Unions and employers who bargain together in accordance with Congressional labor policy are especially vulnerable to allegations that their relationship is a "conspiracy." In describing the collective bargaining process, this Court has observed that the "parties—even granting the modification of views that may come from a realization of economic interdependence—still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest." *Labor Board v. Insurance Agents*, 361 U.S. 477, 488; *see also*, *Pennington*, *supra*, quoted at p. 16.

The co-existence of "economic interdependence" and contrary "viewpoints and concepts of self-interest" is central to the problem. If the existence of economic interdependence between unions and employers, and rational behavior by both in furtherance of their mutual interest is sufficient to permit an inference of an antitrust conspiracy, then the very relationship which it is the policy of the labor laws to further will create a serious risk of liability under the antitrust laws. It is the insight of *Monsanto* that conspiracy inferences must not be permitted on "highly ambiguous evidence" lest doctrines which limit the sweep of the antitrust laws—there *Sylvania* and *Colgate*; here the "statutory" and "nonstatutory" exemptions—be "seriously eroded."

III.

This certiorari petition should be granted also to resolve a conflict in the circuits concerning the preclusive effect to be given in civil litigation to the decisions of the National Labor Relations Board.

The district court held that Altemose is collaterally estopped with respect to the finding of the NLRB in

Building & Construction Trades Council (Altemose Construction), 222 NLRB 1276 (1976), *aff'd mem. sub nom. Altemose Construction v. NLRB*, No. 76-1336, 93 LRRM 3085 (3d Cir., Dec. 8, 1976), that the Council had picketed Altemose for organizational and recognitional objectives in violation of § 8(b)(7)(C). App. 58a. The court of appeals reversed the district court, ruling that since "Altemose, as the charging party, had no control over the factual or legal issues tried before the Board because the General Counsel controlled the litigation, 29 U.S.C. § 160 (1982)", Altemose did not have "a full and fair opportunity to litigate the issue of organizational purpose before the Board, and [is] free to attempt to do so in this proceeding." App. 18a, footnote omitted. This ruling was necessary (though not sufficient, see point I, *supra*) for the court of appeals' reversal of the summary judgment on count II.[13]

The court of appeals' holding that a charging party may not be collaterally estopped by findings of the NLRB is directly in conflict with decisions of the Fifth and Sixth Circuits. In *International Wire v. Local 38, Int. Bro. of Elec. Wkrs.*, 475 F.2d 1078 (C.A. 6), *cert. den.*, 414 U.S. 867, the court affirmed the dismissal of an action under § 303 of the LMRA for damages caused by an alleged secondary boycott in violation of § 8(b)(4). The

---

[13] The court of appeals determined that the Chamber of Commerce was not estopped from litigating the question of the union's objective for the additional reason that the Chamber had not been a party to the proceedings before the Board. App. 18a. Review of the collateral estoppel ruling with respect to Altemose is called for nevertheless because, in addition to the general importance of resolving the conflict among the circuits on that question, a resolution with respect to Altemose would be "fundamental to the further conduct of th[is] case." *U.S. v. General Motors*, 323 U.S. 373, 377. Only Altemose is seeking damages; reinstatement of the summary judgment against that party would therefore greatly simplify the proceedings on remand. Moreover, the Chamber's request for injunctive relief may be subject to dismissal under the Norris-LaGuardia Act. See *Connell*, 421 U.S. at 637, n.19; *Drivers' Union v. Lake Valley Co.*, 311 U.S. 91.

Sixth Circuit held that the employer was collaterally estopped by the NLRB's prior determination, in a case arising from charges filed by the employer, that the union had not violated § 8(b)(4). 475 F.2d at 1079. In *Machinists v. Nix*, 512 F.2d 125 (C.A. 5), the Fifth Circuit held that an employee was precluded from relitigating in state court the issue of whether he had stolen confidential documents because this issue had been litigated before and decided against the employee by the Board in a case initiated by his unfair labor practice charge against his employer, the Machinists Union. Since resolution of the issue was necessary to the Board's decision, the employee was precluded by collateral estoppel from relitigating it in state court. *Id.* at 132.

In granting the Board's decision preclusive effect the district court followed this Court's seminal decision in *United States v. Utah Construction Co.*, 384 U.S. 394, 422. App. 58a, n.78. In *Utah Construction* the Court held:

> When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. [384 U.S. at 422]

In accordance with that decision several courts of appeals, including the court below, have precluded a party which was a respondent before the NLRB from relitigating an issue there decided.[14] Unlike the Fifth and Sixth Circuits in the cases discussed above, however, the Third Circuit has ruled here that a charging party is not sub-

---

[14] *See, e.g., Consolidated Express, Inc. v. New York Shipping Ass'n*, 602 F.2d 494, 503 (C.A. 3), *vacated and remanded*, 448 U.S. 902; *Paramount Transp. Sys. v. Chauffeurs, Teamsters & Helpers Local 150*, 529 F.2d 1284 (C.A. 9), *cert. den.*, 426 U.S. 908; *Painters District Council 38 v. Edgewood Contracting Co.*, 416 F.2d 1091 (C.A. 5).

ject to that preclusion rule because of what that court perceived to be limitations on the charging party's role before the NLRB. In this the court below erred.

Under the NLRB's Rules and Regulations, the charging party in an unfair labor practice case is a "party" to the proceedings on the complaint generated by his charge and has the right to participate in the hearings before the administrative law judge "to call, examine and cross-examine witnesses, and to introduce into the record documentary or other evidence, ..." 29 CFR §§ 102.8 & 102.38.[15] As a "party," the charging party also has the right to file exceptions with the Board to the administrative law judge's decision, and to file a brief with the Board in support of its exceptions or of the administrative law judge's decision. 29 CFR § 102.46. Altemose exercised these rights by intervening in the proceedings before the administrative law judge, 222 NLRB at 1281, and filing both exceptions to the ALJ's decision and briefs to the NLRB, *id.*, at 1276. Thus, contrary to the court of appeals, Altemose had a "full and fair opportunity to litigate the issue of organizational purpose before the Board," and, indeed, Altemose prevailed on that issue.

The court of appeals' decision, therefore, is inconsistent with the principle established in *Utah Construction*, and the decisions of the Fifth and Sixth Circuits which adhere thereto.

---

[15] The administrative law judge is authorized to limit the participation of any party, and to the extent that such limitation is actually imposed and prejudices the ability of the party to fully and fairly litigate a particular issue, that party would not be precluded from relitigating that issue later. That is not the case here.

CONCLUSION

For the above stated reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD N. KATZ
Lewis Tower Building
15th & Locust Streets
Philadelphia, PA 19102

RICHARD B. SIGMOND
260 South Broad Street
Philadelphia, PA 19102

LAURENCE J. COHEN
1125 - 15th Street, N.W.
Washington, D.C. 20005

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

LAURENCE GOLD
815 - 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)